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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability	)))	CC Docket No. 98-147

To: The Commission

COMMENTS OF THE ALLIANCE FOR PUBLIC TECHNOLOGY

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September 25, 1998

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COMMENTS OF THE ALLIANCE FOR PUBLIC TECHNOLOGY

INTRODUCTION AND SUMMARY

The Alliance for Public Technology (APT) submits the following comments in support of the policies set out in the Notice in the above-titled rulemaking (or NPRM), but with the strong recommendation for a different legal approach, resulting in both a stronger legal and policy position. Specifically, APT urges the Commission to remove investment barriers for incumbent local exchange carriers (ILECs) and competitive local exchange carriers (CLECs) by "leveling the playing field" for competitors to the greatest extent possible. The Commission has proposed to do so in part by permitting ILECs to provide advanced services through unregulated subsidiaries. Recognizing that competition is likely to compel these subsidiaries to act like other CLECs, which tend to focus on high-margin customers at the expense of the ubiquity goal of Section 706, we ask the Commission to monitor carefully ILECs' use of advanced services affiliates and to consider phasing out their use over time. In making this request, we note the critical need for the Commission to combine its monitoring activities with a commitment to implement the affirmative measures we recommend to overcome market failures that impede "deployment of advanced telecommunications capability to all Americans."

Our comments also advocate that the Commission use its discretion under Section

251(d)(2) to determine which network elements ILECs must unbundle and resell as a means of providing itself the flexibility, as conditions change, to modify the advanced services subsidiary proposal in accordance with public interest considerations. We suggest further that the Commission refrain now from imposing wholesale resale requirements on advanced capabilities to avoid unnecessary disruption later and to promote Section 706's goal of advanced universal service.

APT is a non-profit consumer advocacy and education organization comprised of almost 300 members, including other non-profit organizations and individuals. Its members support APT's mission to ensure that all people of the United States, regardless of race, income level, urban or rural residence, or functional limitation enjoy affordable, equitable access to communications technology and information in their homes. To advance this goal, APT filed a petition asking the Commission to begin simultaneous inquiry and rulemaking proceedings to implement Section 706 of the Telecommunications Act of 1996. In the Petition, APT urged the Commission to adopt various policies both to remove barriers inhibiting advanced telecommunications infrastructure deployment, and to actively promote infrastructure investment.[1]

We commend the Commission for initiating dual proceedings under Section 706 for the purpose of creating "marketplace conditions conducive to the nationwide

[1] See Petition of the Alliance for Public Technology Requesting Issuance of Notice of Inquiry and Notice of Proposed Rulemaking to Implement Section 706 of the 1996 Telecommunications Act, RM-9244, February 18, 1998 (APT Petition).

deployment of advanced telecommunications services, such as high-speed Internet and video telephony, by all providers."[2] APT believes that these proceedings can help to ensure that low income families, rural residents, consumers, minorities, senior citizens, people with disabilities and small business owners will receive the empowering benefits of advanced telecommunications technology. Accordingly, we set forth below our recommendation for an alternative legal approach that we contend will strengthen the Commission's legal and policy bases for its actions.

1. The basic policy thrust – to promote Section 706 by allowing "both the incumbent and new entrants to provide advanced telecommunications services to the public based on market risk and reward."[3]

We agree fully with the above policy thrust of the Notice.[4] If the complex and detailed regulatory scheme set out in Section 251(c)(3) and (4) were applicable to advanced telecom operations of ILECs, they would assuredly be operating in the marketplace but under the heaviest possible regulation. Further, disparate treatment of cable and telephone companies would result. Cable is now providing high-speed data access through cable modems, free from any such heavy regulation. The telcos also are beginning from "scratch" in this field and are endeavoring to provide their competitive input, largely through xDSL services. It makes no policy sense to handicap this new competitive race by burdening the telco entry with complex regulation. The matter should be fought out in the market.

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[2] "FCC Launches Inquiry, Proposes Actions to Promote the Deployment of Advanced Telecommunications Services By all Providers," FCC News Release on Report No. CC 98-24, August 6, 1998 at 1.

[3] Id.

[4] See APT Petition; Comments of the Alliance for Public Technology Supporting Immediate Implementation of Section 706 of the Telecommunications Act of 1996, RM-9244, April 13, 1998; and Reply Comments of the Alliance for Public Technology, RM-9244, May 4, 1998.

Indeed, with the applicability of "resale" under Section 251(c)(3) and (4),[5] both cable and newcomers like Covad face unfair competition. Cable companies like Cox have invested billions of dollars to modernize their systems to provide high-speed digital services; so also Covad needs access to the conditioned local loop and co-location, but it is investing substantial sums to supply its own electronic equipment, such as the DSLAM.[6]

Suppose, however, that large competitors like AT&T, MCI and Sprint decide to enter this field based solely on "resale" of the ILEC's advanced telecom using substantial discounts and the incumbents' operations support systems (OSS). Consequently, these competitors, unlike Cox and Covad, have no infrastructure investment, little risk, and can simply expand their very considerable marketing and billing arrangements to include new advanced services. We submit that these circumstances discourage rather than promote investment for advanced telecom capabilities as Section 706 intends. See APT Petition at 11. Significantly, the Bell Atlantic-New York Long Distance Pre-Filing Statement covers "plain old telephone service" (POTs) and BRI-ISDN, but not advanced telecom capabilities like xDSL.

2. The policy of strengthening competitors' access to the loop and to floor space in the ILEC central office (co-location).

We strongly support the proposals in the Notice to strengthen competitors' access to the critical element, the local loop, and to facilitate effective co-location. Of course, as

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[5] We use the term "resale" to include both the "unbundled network element platform" (UNE platform) and wholesale resale (TSR). Assuming that the Supreme Court affirms the FCC position, the UNE platform would be available at the TELRIC discount, which has been estimated to be substantially lower than the roughly 20 percent TSR discount. The important point for the above discussion is that there is a significant discount, especially in densely populated areas where competition is most likely to emerge.

[6] See "Covad CEO Aims to Make DSL As Pervasive as Current Modems," *Telecommunications Reports*, June 1, 1998 at 43-45.

the Notice recognizes, there can be difficulties in this regard; "the devil is always in the details." But the general proposals are worthy.

So also is the use of a separate subsidiary. As we stated in our Petition at page 17, such an approach has two marked advantages: (i) it allows for deregulation of the sub (i.e., no economic regulation because it lacks market power); and (ii) it "helps guard against anti-competitive activity since relations between the subsidiary and the parent ILEC would be open to full scrutiny, thus assuring treatment parity for other CLECs."

But it is on the matter of separate subs or the "advanced services affiliates" as the Commission terms them in Paragraph 86, that we disagree with the Commission's proposal and urge a different legal and possible future policy course. We now turn to our suggested course.

3. The appropriate legal and policy course.

The Commission does not require the use of the separate sub but rather gives the ILEC the option of using that method to avoid application of Section 251(c). The Commission's legal theory is that the sub, as structured in its proposal, is not a "successor or assign" of the ILEC (see NPRM at Paras. 90-92) and thus is a CLEC, not an ILEC, for this advanced telecom operation.

Under our approach, we would require the use of the separate sub because of its competitive benefits described in (i) and (ii) above (see APT Petition at 17; and NPRM at Para. 85). The Commission in the past has required the use of separate subsidiaries, and this would simply be another instance where it is generally called for because it has been found appropriate to provide a level playing field for competitors.

We say "generally" because there are serious questions about the broader impact of subsidiaries on the "ubiquity" objectives of infrastructure deployment that the Commission must monitor very carefully. APT is concerned that the present proposal, absent close supervision by the Commission, may help to institutionalize competitors' preference for business and affluent residential customers and perpetuate a disregard for ordinary residential and small business consumers in impoverished, rural or other less attractive markets. Such monitoring is critically important to the implementation of Section 706 when subsidiaries are permitted or structured to become vehicles for accommodating a competitive "level playing field" that strongly favors the high end of the market. Where this becomes a reality, the use of subsidiaries would not fully serve the public interest either in urban communities "marginalized" by the market or in sparsely populated rural areas. APT's support of a more appropriate way of requiring ILECs to establish subsidiaries to roll out high-capacity bandwith in a competitive environment recognizes this potential problem with the use of subsidiaries.[7]

Thus we have coupled our support of a subsidiary mechanism,[8] as set forth in these comments, with an emphasis on APT's pro-active recommendations. These

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[7] The Commission's method of permitting an independent subsidiary to offer competitive high-capacity services creates an affiliate that relates to the ILEC in the same manner as any other CLEC. While that may be the desired end, creating a subsidiary in the image of a CLEC also establishes an economic mandate for ILECs to behave like CLECs. If the subsidiary wants to survive in the evolving and fiercely competitive market for advanced services, such market conditions will force it to concentrate on the high end of the market, as indicated above. In short, the ILEC will not be able to use the economies of scale and scope that would have helped it to serve the broadest base of customers as Section 706 intends. APT's recommendation requiring establishment of a subsidiary mitigates this adverse impact so that pro-active policies to encourage deployment of advanced technologies to marginalized communities have fewer hurdles to overcome.

[8] Even in expressing our qualified support of separate subsidiaries, we caution the Commission to evaluate carefully the impact of its proposed requirement that the incumbent and affiliate maintain separate employees. See NPRM at Para. 96. Such a requirement may encourage incumbents with union employees to move work associated with new advanced services to a workforce not covered by a collective bargaining agreement. As a result, union workers may not receive retraining that will update their skills and provide them with new opportunities, or that will facilitate development of an internal labor pool for ILECs. In

recommendations help to overcome rivals' propensity in a competitive marketplace to focus on high margin customers and to direct public policy more effectively on community-driven applications development and demand aggregation that brings marginalized communities and rural areas within the orbit of the digital world.

We have recently reiterated our pro-active recommendations in the Commission's inquiry evaluating deployment of advanced telecommunications capability to all Americans under Section 706.[9] Below, we specifically reference two of them. It is most important in the instant proceeding that the Commission recognize the urgent necessity of coupling pro-active policies for advancing the ubiquity goals of Section 706 with use of the subsidiary as a vehicle for promoting a competitively "level playing field" for the deployment of advanced network capability. This commitment should signal a clear intent by the Commission to confront market failures as they become evident. Our central point is that the economies of scale and scope of telecommunications networks must reach the full spectrum of society. The purpose of the subsidiary approach is to promote competition as a means to an end. Appropriate use of subsidiaries must not sanction an outcome that limits competitive services to high-margin subscribers.

Accordingly, we strongly urge the Commission to monitor closely experience with subsidiaries and to consider terminating their use in three years, for example, if evidence demonstrates that advanced services affiliates are restricting service only to

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addition, the proposal could cause exclusion of an affiliate's employees from the benefits of collective bargaining until they are able to organize their own unit for that purpose. Therefore, APT asks that the Commission guard against this potential adverse impact on workers by reexamining its proposed requirement for separate employees and by taking other action as it deems appropriate.

[9] See Comments of the Alliance for Public Technology, In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, September 14, 1998 (APT NOI Comments) at 4-

high paying customers.[10] In such case, including indications that advanced services affiliates are not extending their infrastructure to low income, rural and other high cost areas, APT strongly suggests that the Commission permit ILECs to offer advanced services in those communities on an integrated basis. This approach would enable ILECs to maximize the scale and scope of their operations to serve less attractive customers consistent with Section 706's goal that all Americans obtain access to advanced networks.

We are not suggesting that the Commission predetermine the necessity of relief from the subsidiary requirement—only that it is most desirable for it to have flexibility to deal with situations as the public interest dictates. Our primary point is that the potential downside of subsidiaries heightens the need for our pro-active policy proposals. The Commission must combine policies for removing barriers to facilities-based infrastructure investments with complementary policies that make the marketplace work for everyone.

The Commission, however, has "boxed itself in" with its legal theory. It must adhere to the separate sub approach, no matter what the record shows, because that is its only basis for not applying the unbundling and resale requirements of Section 251(c) of the 1996 Act. Thus, even as to transfer of equipment purchased in good faith by the ILEC for an integrated operation, the Commission struggles with the issue, and concludes

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8. We have attached APT's NOI Comments as Appendix A. See also, APT Petition at 28-41 for the initial discussion of these recommendations.

10 Thus, Section 272 requires the use of separate subsidiaries by the Bell operating companies for various purposes, but specifies in subsection (f) a sunset (e.g., three years) unless extended by the Commission. The Commission inquired whether the sub proposed for advanced telecom services should end at the same time as the in-region long distance sub. See NPRM at Para. 99. But see the above discussion of the difficulty in proceeding in this manner.

that it can only allow "de minimis" transfers between the parent and the sub. See NPRM at Paras. 105-106. This highly technical approach casts the Government in a poor light.

We believe that there is an alternative approach that is much more appropriate, and allows for flexibility in the use of separate subsidiaries. As we urged in comments on our Petition:

> ...What we are raising now is the policy issue of whether, consistent with the Act, the Act's purpose (see APT Pet. at n.5), and the public interest standard, the UNE platform should extend to advanced capabilities, or be limited to the existing ILEC network. The Commission surely has the power, in an appropriate rulemaking proceeding, to adopt the policy modification here urged. It is the Commission's responsibility to balance the contending considerations -- the CLECs' need for such future advanced capabilities against providing incentives for the ILECs to initiate such capabilities to residences [footnote omitted] in order to distinguish their networks from those of resellers (including those using the UNE platform) and to meet the broadband competition now presented by cable companies.
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> In a paper delivered by Dr. Joseph Farrell, then Chief Economist of the FCC, he stated (at 46) that "... Section 251(d)(2) tells the Commission, in choosing what network elements should be unbundled, to consider, at a minimum, whether unbundled access to 'proprietary' network elements is 'necessary,' and whether failure to 'provide access' would impair competitors' ability to provide service... there seems to be scope, as there ought to be, to consider the competitive implications of requiring or not requiring unbundling [footnote omitted]." That is precisely what APT is requesting the FCC to do in the proposed rulemaking -- to consider whether competition and the public interest are better served by requiring or not requiring unbundling of advanced capabilities not yet in existence. We submit that for the reasons set forth in our petition, the balance should be struck in favor of not unbundling.[11]

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[11] Comments of The Alliance for Public Technology Supporting Immediate Implementation Of Section 706 of the Telecommunications Act of 1996, In the Matter of Petition of the Alliance for Public Technology Requesting Issuance of Notice of Inquiry and Notice of Proposed Rulemaking to Implement Section 706 of the 1996 Telecommunications Act, RM-9244, April 13, 1998 at 2-3.

The Eighth Circuit Court of Appeals has held several times, and justly, that the Commission has the discretion to determine which networks elements are to be unbundled and how that should occur. See, e.g., SBC et al. v. FCC, Case no. 97-3389, 1998 U.S. App. LEXIS 18352, *16 (August 10, 1998). ("Where, as it has here in Section 251(d)(2), Congress expressly delegates to an agency the power to formulate policy and fill gaps in a statutory scheme, we defer to agency regulations promulgated pursuant to such delegation 'unless they are arbitrary, capricious, or manifestly contrary to the statute.'" [Citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984)]. In its recent decision, the Eighth Circuit court stated:

> Although Congress defined the term "network element" in the Act, it invested the FCC with the authority to determine which network elements should be made available to new entrants on an unbundled basis. See 47 U.S.C.A. Sec. 251(d)(2). Section 251(d)(2) limits the FCC's authority in this regard only insofar as it requires the FCC to consider two factors "at a minimum" as it makes this decision. These factors are whether "access to such network elements as are proprietary in nature is necessary," and whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[Citation omitted]. Id. at * 4.

At the tail end of the NPRM, the Commission has finally turned to the applicability of Section 251(d)(2). See NPRM at Paras. 179-184. We submit that the Commission should exercise its discretion under Section 251 to reach the sound conclusion we propose above. The Commission may or may not be correct that Section 706 confers no independent grant of power, but the provision strongly directs the Commission to take its purpose and aims into consideration when engaged in any "regulating method." It would be clear error for the Commission to disregard this important directive when exercising its discretion under Section 251.

The above discussion deals with the applicability of the UNE platform to the ILEC's advanced telecom capabilities. We turn now to the issue of the applicability of Section 251(c)(4) — the Act's wholesale resale provision. We believe that it is sound policy for resale (see Section 251(b)(1)) to apply to such capabilities and not wholesale resale. We also believe that the Commission has the power to act in this regard as set out in pages 17-19 of our Petition.

We recognized in that analysis what the Commission has again stressed in the NPRM – that Section 401(d) prohibits the Commission from forbearing application of Section 251's requirements until it determines that they have been fully implemented. But consider what would occur if wholesale resale were implemented for ILEC xDSL service. One month after such implementation, an incumbent could file a persuasive petition asking the FCC to forbear on the grounds that all the requirements of Section 401(a) are met, and indeed, under the Commission's proposed regulatory regime for advanced telecom capabilities (regarding co-location, loop availability and the use generally of a separate subsidiary) the public interest is served by forbearance. The Commission's very proposal in this proceeding establishes that all the requirements for forbearance are met --- no need for rate regulation, public interest protection against discrimination of competitors, and public interest benefits for consumers. We contend therefore that in view of Section 401(a)'s conditions and again taking into account the clear statutory directive of Section 706, the Commission does have the discretion to act now in the public interest as to these advanced telecom capabilities. If not now, when would the Commission act – after six months or a year? This would be simply an

unnecessarily disruptive way of proceeding.[12] We again implore the Commission to adopt a common sense approach to this issue.

4. Affirmative policies to promote infrastructure investment for advanced capabilities.

In our Petition, we set forth a number of policies that would promote infrastructure investment for advanced telecom capabilities. While the Commission has noted these policies in its Notice of Inquiry in CC Docket No. 98-146,[13] we believe that two of them are of such importance that they warrant consideration in this proceeding also.

First is our request that the Commission establish a federal/state policy framework for nurturing community-driven demand aggregation for technology applications, which would provide demand sufficient to pull advanced telecom infrastructure investments to the home. See Appendix A at 4-5. Second is our proposal that the Commission, following its precedent in the cable industry, adjust the productivity index to accelerate investment in infrastructure investments in advanced telecommunications capabilities. See Appendix A at 6-8. We advance this suggestion as a counterproposal in this rulemaking because the Commission may need to adopt such action to alleviate problems associated with its present approach.

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[12] We do not believe that it is sound construction of either Sections 401(d) or 251 that no forbearance of any ILEC telecom service coming under Section 251 may occur until every aspect of Section 251 is fully implemented. Section 401 (and 402) have a salutary purpose of avoiding unnecessary regulation of any "telecommunications service" (401(a)(1)), and should therefore be given a sensible, remedial reading.

[13] See Notice of Inquiry, In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps

CONCLUSION

We strongly commend the Commission for issuing a Notice of Proposed Rulemaking and making clear that expeditious resolution of the proceeding is in order. We further support the policies outlined in the NPRM. We do urge that adopting the legal approach we recommend will place the Commission in much better stead to further the public interest as it undertakes its important obligation to encourage the reasonable and timely deployment of advanced telecommunications capabilities to all Americans.

Continued growth of the digital divide necessitates that the Commission promptly and decisively implement Section 706 using all of the authority and discretion that Congress has delegated to it. Therefore, we respectfully request that the Commission revise its proposed rules as APT has recommended.

Respectfully submitted,

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to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-148, (released August 7, 1998) at Paras. 71-72.

APPENDIX A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Inquiry Concerning the Deployment of	)	
Advanced Telecommunications Capability	)	
To All Americans in a Reasonable and	)	CC Docket 98-146
Timely Fashion, and Possible Steps to	)	
Accelerate Such Deployment Pursuant	)	
to Section 706 of the Telecommunications	)	
Act of 1996	)	

COMMENTS OF THE ALLIANCE FOR PUBLIC TECHNOLOGY

INTRODUCTION

The Alliance for Public Technology (APT) is pleased to submit these comments in response to the Commission's Notice of Inquiry (NOI) released on August 7, 1998 in the above-referenced docket. In evaluating whether advanced telecommunications capability is being deployed to all Americans in the "reasonable and timely" fashion that Congress mandated in Section 706 of the Telecommunications Act of 1996,[1] the Commission has requested comment from "those who could be most affected by the outcome."[2] APT represents almost 300 non-profit organizations and individuals that serve thousands of people, including low-income families, rural residents, consumers, minorities, senior citizens, people with disabilities, and small business owners whose lives could be greatly improved by access to advanced telecommunications networks. By making possible distance and life-long learning, telemedicine, and independent living for

[1] Codified at 47 USC Section 157 note.

senior citizens and people with disabilities, these and other creative applications delivered over high-speed, broadband networks can most benefit the nation's least advantaged residents by helping them to overcome the social, economic and political challenges they face.

For more than ten years, APT has consistently worked to ensure that all people of the United States, regardless of race, income level, urban or rural residence, or functional limitation have affordable and equitable access to information and telecommunications technology in their homes. As the telecommunications industry moves from a regulated monopoly to competition, which is a primary purpose of the 1996 Act[3], APT fears that service providers in their quest to gain market share will neglect all but large businesses and other affluent customers to the detriment of ordinary residential and rural customers. The "electronic redlining" that is likely to result, particularly if ILECS establish separate unregulated data subsidiaries under the Commission's recent proposal,[4] may prevent all Americans from obtaining access to the advanced telecommunications capability that Congress promised in Section 706. Recent reports confirm that the "digital divide," into which millions are falling due to their lack of access to affordable information technology, is a persistent, pernicious problem.[5] Thus, APT firmly believes that the

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[2] NOI at Para. 12.

[3] The complete title of the Telecommunications Act of 1996 is "An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Public Law 104-104, February 8, 1996.

[4] Memorandum and Order, and Notice of Proposed Rulemaking In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, et al.. Docket No. 98-147 (released August 7, 1998) at Paras. 85-116.

[5] See, e.g., "Falling Through the Net II: New Data on the Digital Divide," National Telecommunications and Information Administration, U.S. Department of Commerce, July 1998; "Losing Ground Bit by Bit: Low Income Communities in the Information Age," Benton Foundation and the National Urban League, June 1998; and "Closing the Digital Divide: Enhancing Hispanic Participation in the Information Age," The Tomas Rivera Policy Institute, 1998.

Commission must take decisive action to mitigate the foreseeable adverse effects of imperfect competition in an industry of rapidly converging technologies.

Anticipating that the Commission's inquiry might substantiate apprehensions about disparate deployment patterns and demonstrate the need for immediate countervailing public policy to ensure universal access to advanced telecommunications services, APT filed a petition on February 18, 1998.[6] In that petition, APT recommended that the Commission adopt a two-pronged approach of removing barriers to infrastructure investment by incumbent and competitive telecommunications companies and aggressively promoting such investment. The Commission now seeks comments on a broad range of issues, including APT's proactive proposals that the agency: 1) work with states to adjust the productivity factor in the respective federal and state price cap formulas to hasten infrastructure investment by incumbent local exchange carriers (ILECs) through social contracts committing a portion of their efficiency savings to infrastructure deployment in underserved areas; 2) condition approval of telecommunications mergers on a requirement that the merged companies deploy infrastructure to residential and other less attractive markets; and 3) establish a federal-state policy framework that encourages community-based organizations and telecommunications providers to create partnerships in which the parties identify technology applications that address the life needs of marginalized communities and use the organizations' aggregated demand to pull investment there.[7] Below, APT briefly

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[6] Petition of the Alliance for Public Technology Requesting Issuance of Notice of Inquiry and Notice of Proposed Rulemaking to Implement Section 706 of the 1996 Telecommunications Act, RM-9244, filed February 18, 1998 (APT Petition).

[7] NOI at Paras. 71-72.

discusses each of these proposals and respectfully urges the Commission to implement them promptly.

1. Social Compacts Funded By Productivity Factor Adjustments

In its petition, APT suggests that the Commission and states adjust the productivity factors in the price cap formulas applicable respectively to the fees that interexchange carriers pay ILECs for local exchange access and to those that consumers pay ILECs for similar access[8]. APT advocates this market-oriented approach to hasten advanced network deployment in low income, rural and other marginalized communities that ILECs traditionally have considered unprofitable. Under a jointly coordinated federal and state process, the amount of the productivity factor adjustment would depend upon an ILEC's clear and convincing showing of how its accelerated investment was contributing to deployment of any advanced technology it chose. Regulators might limit the adjustment to 0.5%, or reduce or terminate it if initial or subsequent annual reports demonstrate an ILEC's failure to comply with its deployment plans.

As a substitute for rate of return regulation, the price cap regulatory regime offers the FCC, and those states that utilize productivity factors in determining dominant carriers' basic service rates, an effective model for pursuing the ubiquity goal of Section 706 in an increasingly competitive environment. The suggested approach is not only consistent with Congress' intent as evidenced by Section 706's specific reference to price caps as a regulatory tool for promoting deployment of digital networks, it also comports with the "network upgrade" policy that the Commission is utilizing in the cable industry. That policy enables cable companies to execute social contracts that afford them pricing

[8] APT Petition at 29-33.

flexibility for newly introduced regulated services, although rates for existing services remain subject to price caps. In exchange, cable companies agree to use a portion of their increased profits to finance system upgrades.[9] In view of the Commission's desire to facilitate rapid deployment of ubiquitous advanced telecommunications networks by all segments of the communications industry[10] and to harmonize its regulatory treatment of different technologies,[11] APT strongly recommends that the Commission, in coordination with relevant states, adopt social contracts that reflect productivity index adjustments to promote increased deployment in underserved areas.

2. Merger Conditions Requiring Infrastructure Deployment in Impoverished, Rural and Other Marginalized Communities

In the wake of recently announced plans for a new round of consolidation in the telecommunications industry, APT believes now, more than ever, that the Commission should incorporate into its evaluation of whether any proposed transaction serves the "public interest, convenience and necessity,"[12] consideration of whether it also furthers Section 706's advanced universal service goal.[13] If the Commission determines that approval is appropriate, then APT urges the Commission to require the surviving company to use some portion of the "synergy savings" to deploy and upgrade telecommunications infrastructure in historically underserved communities.

As APT has previously pointed out, the Commission has already successfully employed social contracts to stimulate cable system improvements. Similarly, the Commission might follow the example of the California Public Utility Commission,

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9 See APT Petition at 32.
10 See NOI at Para. 12.
11 NOI at. Para. 4.
12 47 U.S.C. Sec. 310(d). See also, 47 U.S.C. Sec. 214 (a).
13 See APT Petition at 33-34.

which approved SBC's merger with Pacific Telesis on the condition that SBC establish a Community Technology Fund to finance construction of advanced network facilities for low income, rural and other consumers in California.[14] Through its use of social contracts in this manner, the Commission can monitor advanced infrastructure deployment to ensure that the proposed transaction helps, not hinders, the ubiquity goal of Section 706.

3. Federal-State Policies to Encourage Partnerships that Nurture Community-Driven Demand for Technology Applications that Pull Investment for Advanced Infrastructure into Underserved Communities

APT contends that as competition emerges, it is imperative that the Commission join with the states to establish policies that perpetuate partnerships between telecommunications providers and community-based organizations to nurture demand for advanced services in communities where carriers presume it does not exist at sufficient levels to warrant investment. This unique recommendation recognizes that as competition grows, low income, rural and high-cost areas risk being bypassed by the information superhighway unless the Commission and states adopt policies to facilitate communities and telecommunications providers working together to aggregate effective demand for community based applications of information technologies. APT believes that once developed, the communities' aggregated demand will attract investment there. Because states are closest to communities where market forces are actually playing out, APT is urging the FCC to create a federal/state "joint board" to develop options and

[14] Order Denying Rehearing and Modifying D.97-03-067, In the Matter of the Joint application of pacific Bell Telesis Group (Telesis) and SBC Communications, Inc. (SBC) for SBC to Control Pacific Bell (U1001), Which Will Occur Indirectly as a Result of Telesis Mergers With a Wholly Owned Subsidiary of SBC, SBC Communications (NV) Inc., Decision 97-11-05 (Nov. 5, 1997).

provide a resource base for implementing the recommendation along the lines suggested in APT's filing.[15]

APT believes strongly that the proactive policies it is suggesting for the Commission and its state counterparts are crucial to the work of community-based organizations, which are also the primary membership base of APT. Underlying our advocacy is a recognition that the convergent communications and information technologies of the digital age are shaping the future of community life. As market forces are unleashed to develop and deploy them, however, there is growing concern from the President on down that the marketplace is actually laying the groundwork for further economic and social polarization of our society.

As we point out in our Section 706 filing, the reason for this is clear enough. Competitive providers in the converged communications industry lack sustainable marketing vehicles or processes for accessing the innovative capacity of community-based organizations, small businesses and residents of marginalized communities. There are no viable, on-going relationships with competitive providers for addressing the pent-up desire in these communities to participate actively and effectively in the development and marketing of technology applications, which are specifically targeted to advance their economic and social status.

While recognizing that there are a number of tested options for market-oriented, community-driven demand aggregation that may be appropriate for policy implementation embracing devolution, APT has advanced a generic option built on a CBO/community-based model for participatory action research. The emphasis is on

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[15] See APT Petition at 34-41.